

A

**TERRY CHAN KONG NGEE
v. SABAH AIR AVIATION SDN BHD**

HIGH COURT SABAH AND SARAWAK, KOTA KINABALU
FARIDZ GOHIM ABDULLAH JC
[SUIT NO: BKI-22NCvC-63-8-2020]

B

31 OCTOBER 2023

C

D

Abstract – *In interpreting an agreement or contract, the court will ascertain the meaning intended by the parties based on all the facts and circumstances of the case and the words used in the agreement. The court will always rely on the rules that the words should be given their natural and ordinary meaning. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. The contract should be construed as a whole and in harmony with every clause in the contract, in order to ascertain the true intention of the parties.*

E

CONTRACT: *Contract of employment – Breach – Clause in agreement provides contract ‘extendable for another two years on mutual agreement’ – Whether failure by any party to agree to extension would render extension of contract impossible to implement – Whether company to write to employee at end of term for purpose of agreed extension – Whether company’s unilateral decision not to extend employment contract contravened clause in agreement – Whether constituted breach of contract of employment*

F

JURISDICTION: *Proper forum – Civil court – Cause of action – Breach of contract of employment – Whether claim relating to employment – Whether claim under constructive dismissal or breach of contract – Whether Industrial Court proper forum – Whether to be distinguished from case of 7-Eleven Malaysia Sdn Bhd v. Ashvine Hari Krishnan – Whether claim for breach of contract properly commenced in civil court*

G

H

WORDS & PHRASES: *‘extendable for another two years on mutual agreement’ – Meaning of – Whether requires agreement of both parties – Whether failure by any party to agree to extension would render extension of contract impossible to implement – Whether subject to process and procedure agreed by parties*

I

The plaintiff (deceased) was a former employee of the defendant, a Government-linked company under the Ministry of Finance of Sabah and was in the aviation industry. The plaintiff started his employment with the defendant in 1972 as a maintenance engineer and rose to the rank of engineer in charge *cum* technical school instructor. He later retired from the defendant in 2003 upon attaining the age of 55 years old. The plaintiff was head hunted to rejoin the defendant sometime in the month of April 2014 and rejoined the defendant as its chief executive officer *via* a contract of employment dated

24 October 2014. Subsequently, the plaintiff was promoted to be the group chief executive officer *via* a letter dated 13 November 2014. On 15 February 2016, the plaintiff's employment with the defendant was extended for a further period of one year and was given an additional responsibility allowance. Later, on 20 October 2016, the plaintiff's employment was again extended for another year from 24 October 2016 to 23 October 2017 with remuneration package together with the terms and conditions of employment remained the same as per the contract of employment dated 24 October 2014 and the extension letter dated 15 February 2016. The plaintiff resigned on 30 June 2017 and did not further extend his employment with the defendant. However, the plaintiff was subsequently re-engaged by the defendant and an employment contract was signed between the plaintiff and the defendant as evident in the document of Renewal of Fix Term Employment Contract dated 24 October 2017. One of the salient points of the agreement, as stated in cl. 2, was that the plaintiff's duration of employment shall be for two years and extendable for another two years on mutual agreement. It was also agreed that the defendant should write to the plaintiff two months prior to the end of the first two years contract for the purpose and intent of further extension of the employment. On 23 August 2019, DW1, a senior human resources executive and human resources manager, emailed to the plaintiff informing him to write to the defendant on the intent to further extension of his employment, in compliance to para. 2 of the employment contract. However, before the plaintiff could respond to the email, the defendant issued a letter informing the plaintiff that the defendant had decided in not extending his employment contract. The plaintiff alleged that the defendant had unlawfully and prematurely terminated the employment contract and as a result, the plaintiff had suffered losses and damages. Hence, this action by the plaintiff against the defendant for breach of the employment contract by the defendant in not giving the plaintiff the option to extend his employment with the defendant for another two years as stated in his employment contract. The issues that arose for the court's consideration were, (i) whether this court had the jurisdiction to grant the relief sought by the plaintiff in view of the decision of the Court of Appeal in the case of *7-Eleven Malaysia Sdn Bhd v. Ashvine Hari Krishnan* ('7-Eleven case'); and (ii) whether the defendant had breached cl. 2 of the employment contract when it did not extend the plaintiff's employment contract for another two years from 24 October 2019 or had failed to offer the plaintiff an extension of two years employment from 24 October 2019.

Held (allowing plaintiff's claim):

- (1) In the *7-Eleven* case, the plaintiff's case was for constructive dismissal, and it was held by the Court of Appeal ('COA') that, if the pleaded claim is for constructive dismissal or for wrongful dismissal, the employee must commence his case in the Industrial Court. The COA did not state that every claim relating to 'employment' whether for breach of contract

- A or for wrongful dismissal or for constructive dismissal must be commenced in the Industrial Court. The plaintiff's cause of action here was for breach of contract and not for wrongful dismissal and the court had jurisdiction to hear the plaintiff's claim. The decision in the *7-Eleven* case was distinguished and was not applicable to the facts and circumstances of this case. (paras 48, 49, 51 & 106)
- B
- (2) The employment contract must be read as a whole. Clause 2 of the employment contract states, 'The duration of this Employment Contract shall be two years commencing 24 October 2017, extendable for another two years on mutual agreement'. The words 'mutual agreement' in its
- C ordinary meaning required the agreement of both parties to the extension of the said employment contract. Failure by any of the party to agree to the extension will render the said extension of contract impossible to implement. Construed in its ordinary and plain meaning, the employment contract between the plaintiff and the defendant could be extended for another two more years if both parties agreed to such
- D extension. (paras 66, 69)
- (3) The general principle, that failure to cross-examine the witness on any evidence of that witness will render that evidence accepted and admitted by the court, shall not apply in this case. Pursuant to principles laid
- E down in the Federal Court case of *Dr Shanmuganathan v. Periasamy Sithambaram Pillai*, the court should look at the evidence carefully to see whether there are indications that by a completed cross-examination, the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached. The issue in dispute in this case was
- F mainly focused on cl. 2 of the employment contract in respect of the non-extension of the plaintiff's employment. Taking the whole of the plaintiff's testimony and testing the same with the other documentary evidence tendered and testimonies of the witnesses during the trial of this case, there was no indication that by a completed cross-examination, the plaintiff's testimony would be likely to be seriously shaken or his good
- G faith to be successfully impeached. (paras 82, 84, 87, 89, 90 & 91)
- (4) The plain and ordinary meaning of cl. 2 clearly required the defendant to write to the plaintiff two months prior to the end of the two-year period of the plaintiff's employment for the purpose and intent of extension of the plaintiff's employment. The email sent by DW1 on
- H 23 August 2019 was a mere notification to the plaintiff to invite the plaintiff to write to the defendant as to whether the plaintiff wished to extend his employment contract or otherwise. The email clearly did not fulfil the requirement of cl. 2 of the employment contract and therefore, the defendant had breached cl. 2 of the employment contract. Further,
- I the defendant's action of not extending the employment contract was done unilaterally and in breach of the express requirement of mutual agreement under cl. 2 of the employment contract. (paras 100, 102 & 106)

Case(s) referred to:

7-Eleven Malaysia Sdn Bhd v. Ashvine Hari Krishnan [2023] 4 CLJ 895 CA (*dist*)
Catajaya Sdn Bhd v. Shoppoint Sdn Bhd & Ors [2021] 3 CLJ 159 FC (*refd*)
Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC (*foll*)
Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896 (*refd*)

Kho Tian Boo v. Tengku Ibrahim Petra Tengku Indra Petra [2011] CLJU 1603; [2011] 1 LNS 1603 HC (*foll*)

PP v. Dato' Seri Anwar Ibrahim & Anor [2001] 3 CLJ 313 HC (*refd*)
SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC (*refd*)
Terry Chan Kong Ngee v. Sabah Air Aviation Sdn Bhd [2021] CLJU 1123; [2021] 1 LNS 1123 HC (*refd*)

Legislation referred to:

Evidence Act 1950, ss. 91, 92
 Rules of Court 2012, O. 15 r. 7, O. 18 r. 19

Other source(s) referred to:

Phipson on Evidence, 11th edn, para 1544
For the plaintiff - Joan Goh Penn Nee; M/s Goh & Assocs
For the defendant - Sukumaran Vanugopal; M/s S Vanugopal & Partners
Reported by S Barathi

JUDGMENT**Faridz Gohim Abdullah JC:****Introduction**

[1] In this trial, upon the demise of the plaintiff, Mr Terry Chan Kong Ngee (deceased), he was substituted by one Leslie Chan Chau Nyen (the administrator). For the purpose of this trial and judgment, the deceased will be referred as the plaintiff.

[2] The plaintiff, Mr Terry Chan Kong Ngee (deceased), was a former employee of the defendant, Sabah Air Aviation Sdn Bhd.

[3] The defendant is a Government-link company under the Ministry of Finance of Sabah and is in the aviation industry.

[4] The plaintiff had testified on 18 May 2023 before His Lordship, Datuk Christopher Chin Soo Yin as PW1 and he is the only witness called to support the plaintiff's case.

[5] PW1's testimony was through his written witness statement (encl. 72), which was tendered and marked as exh. "WSPW1".

[6] Due to his illness, PW1 was unable to be cross-examined by the counsel for the defendant and it was agreed by both parties during the trial that the witness statement of PW1 is to be admitted subject to the proper weightage to be attached to it at the end of the trial.

A [7] The plaintiff passed away on 22 May 2023, a few days after giving his testimony.

[8] In view of the demise of the plaintiff, an application to substitute the plaintiff was filed under O. 15 r. 7 of the Rules of Court 2012 and was granted on 17 July 2023. Now, the plaintiff is replaced by his administrator, Leslie Chan Chau Nyen (NRIC No. 780331-12-5183), and was made a party to this action and the proceedings thereto and/or arising therefrom shall be carried on as if Leslie Chan Chau Nyen had been substituted for the Terry Chan Kong Ngee as the abovenamed plaintiff.

C **Documents Marked**

[9] The followings are the bundle of documents which has been marked at the trial of this matter:

- (i) agreed bundle of documents (Part B) in encl. 57 marked as Bundle B.
- D (ii) agreed bundle of documents (Part C) in encl. 58 marked as Bundle C.
- (iii) plaintiff's supplementary bundle of documents in encl. 69 marked as PSBOD.
- (iv) summary of defendant's case in encl. 53 marked as SDC.

E **Witness Statements**

[10] The witnesses called to testify during the trial and their respective witness statements are as follows:

- (i) witness statement of Chan Kong Ngee @ Terry Chan (the plaintiff) (encl. no. 72) – WSPW1.
- F (ii) witness statement of Noor Khatijah binti Osman (for the defendant) (encl. no. 89) – WSDW1.
- (iii) witness statement of Mahmud bin Amat Shah (for the defendant) (encl. no. 90) – WSDW2.

G **Issues To Be Tried**

[11] There was no issues to be tried filed by the parties. However, the counsel for the defendant had posed two issues in his written submission in which I agree that those issues are relevant and pertinent issues for determination of this Honourable Court as follows:

H **Issue no. 1:**

Whether this Honourable Court has the jurisdiction to grant the relief sought by the Plaintiff in view of the decision of the Court of Appeal in the case of *7-Eleven Malaysia Sdn Bhd v. Ashvine Hari Krishnan* [2023] 4 CLJ 895

I

Issue no. 2:

A

Whether the Defendant had breached Clause 2 of the Employment Contract when it did not extend the Plaintiff's Employment Contract for another two (2) years from 24th October 2019 or had failed to offer the Plaintiff an extension of 2 years employment from 24th October 2019?

[12] This court will deal with issue no. 1 first and if the answer is in the affirmative, whether the defendant had breached cl. 2 of the employment contract when it did not extend the plaintiff's employment contract.

B

Plaintiff's Case During Trial

[13] At the material time when the plaintiff was giving his testimony before His Lordship Datuk Christopher Chin Soo Yin, the plaintiff was very ill and was admitted to the hospital. In view of his condition, he chose to give his evidence-in-chief from the hospital bed, assisted by his daughter, on 18 May 2023.

C

[14] His evidence-in-chief was as set out in his witness statement, which was marked as "WSPW1".

D

[15] At the request of the plaintiff's learned counsel, no cross-examination was done as the plaintiff was too ill to withstand cross-examination. The court noted that the cross-examination of the plaintiff shall not be proceeded with and that the appropriate weight will be assigned to the plaintiff's evidence in his witness statement at the end of the trial. Thus, the said witness statement, though admissible as statement of the plaintiff in this trial, it shall be subject to the issue of how much weight to be attached to the said untested testimony.

E

Testimony Of PW1 (Chan Kong Ngee @ Terry Chan Kong Ngee)

F

[16] Based on "WSPW1", the plaintiff started his employment with the defendant in 1972 as a maintenance engineer and rose to the rank of engineer in charge *cum* technical school instructor.

[17] He later retired from the defendant in 2003 upon attaining the age of 55 years old.

G

[18] The plaintiff alleged that he was head hunted to rejoin the defendant sometime in the month of April 2014.

[19] The plaintiff thereafter agreed to rejoin the defendant as its chief executive officer in October 2014.

H

[20] The plaintiff further contends that prior to rejoining the defendant, the plaintiff was working on his own, earning a steady income.

[21] The plaintiff agreed to rejoin the defendant and was engaged as the chief executive officer (hereinafter referred to as "CEO") *via* a contract of employment dated 24 October 2014 and the same was to take effect also on 24 October 2014 (encl. 57 – Bundle B, pp. 21 to 28).

I

- A [22] The plaintiff was promoted to be the group chief executive officer (hereinafter referred to as “GCEO”) *via* a letter dated 13 November 2014 (encl. 57 – Bundle B, p. 29) and was tasked to oversee the group of companies’ activities for Sazma Aviation Sdn Bhd, Borneo Air Sdn Bhd, Sabah Air Training Sdn Bhd and Jesselton Aviation Sdn Bhd.
- B [23] On 15 February 2016, the plaintiff’s employment with the defendant was extended for a further period of one years effective from 24 October 2015 to 23 October 2016 and was given an additional responsibility allowance of RM6,537.50 per month (encl. 57 – Bundle B, p. 31).
- C [24] Later, on 20 October 2016, the plaintiff’s employment was again extended for another year from 24 October 2016 to 23 October 2017. The plaintiff’s remuneration package, together with the terms and conditions of employment, remained the same as per the contract of employment dated 24 October 2014 and the extension letter dated 15 February 2016 (encl. 57 – Bundle B, p. 33).
- D [25] The plaintiff avers that upon the expiration of the contract of employment dated 24 October 2014 and its subsequent extension until 23 October 2017, he was no longer interested to work for the defendant due to various misunderstandings with the then chairman of the defendant, Dato’ Harun Hj Ismail. The alleged misunderstandings were as listed in his statement of claim (para. 3(h)(i) to (iv)).
- E [26] Those misunderstandings had caused the plaintiff to tender his resignation on 30 June 2017 (encl. 57 – Bundle B, p. 286), hence, did not further extend his employment with the defendant thereafter.
- F [27] Sometime in August 2017, the plaintiff avers that he was approached by a director and shareholder of the defendant, requesting for him to return to the defendant company, and after much persuasion, the plaintiff agreed to be engaged by the defendant.
- G [28] On 26 September 2017 the plaintiff had emailed to the defendant insisting on a different terms of employment. The plaintiff contends that the terms and conditions were duly reduced into writing *via* a letter entitled Renewal Of Fix Term Employment Contract dated 24 October 2017 (hereinafter referred to as “employment contract”) with terms and conditions as follows:
- H (i) position: group chief executive officer.
- (ii) duration contract terms: two years commencing from 24 October 2017, extendable for another two years on mutual agreement. The defendant shall write to the plaintiff two months prior to the end of the two years contract for the purpose and intent of further extension of employment.
- I

- (iii) basic salary: RM30,000 per month. A
 - (iv) car allowance: RM1,500 per month.
 - (v) employees provident fund contributions.
 - (vi) responsibility allowance of RM2,500 per month. B
 - (vii) suit allowance of RM2,500 per year.
 - (viii) medical allowance of RM2,500 per year.
 - (ix) telephone allowance of RM400 per month.
 - (x) fuel allowance of RM400 per month. C
 - (xi) housing allowance of RM1,200 per month.
 - (xii) yearly bonuses.
 - (xiii) yearly increment.
- [29] The said employment contract was accepted and signed by the plaintiff and the defendant on 24 October 2017 (encl. 57 – Bundle B, pp. 60 to 61). D
- [30] On 23 August 2019, DW1, a senior human resources executive and human resources manager, issued an email to the plaintiff, informing him to write to the defendant on the intent to further extension of his employment. This was in compliance to para. 2 of the employment contract. The said email was tendered in encl. 57 – Bundle B, p. 67. E
- [31] However, before the plaintiff could respond to the said email, the defendant, through its chairman (DW2), at that material time, had issued a letter dated 23 August 2019 (encl. 57 – Bundle B, p. 68) to the plaintiff informing the plaintiff that the defendant has decided in not extending his employment contract. F
- [32] The plaintiff alleged that the defendant has unlawfully and prematurely terminated the said employment contract and as a result thereof, the plaintiff has suffered losses and damages. G
- [33] The above episode had caused the plaintiff to commence this action against the defendant basically for breach of the employment contract by the defendant in not giving the plaintiff the option to extend his employment with the defendant for another two years as stated in his employment contract. H
- Defendant's Case During Trial**
- [34] The defendants through their witnesses DW1 and DW2, testifies in court and tendered their respective witness statements and marked as “WSDW1” and “WSDW2”, respectively. I

A *Testimony Of DW1 (Noor Khatijah binti Osman)*

[35] DW1 is the human resources manager of the defendant. She gave a brief background of the plaintiff's employment with the defendant as follows:

Q3: Can you please give a summary of the Plaintiff's employment with the Company

B

A: Mr Terry Chan was engaged under various employment contracts, viz:

C

(a) He served under a one-year Contract of Employment dated 24th October 2014 as the Chief Executive Officer when he was above 66 years of age [see pages 76 to 83, Defendant's Bundle of Documents (Enclosure No. 44)];

D

(b) Under a further one-year Contract from 24th October 2015 to 23rd October 2016 he continued to serve the Company in the capacity of Group Chief Executive Officer in terms of the letter dated 15th February 2016 [see page 87, Defendant's Bundle of Documents (Enclosure No. 44)];

E

(c) Under a further one-year Contract from 24th October 2016 to 23rd October 2017 he continued in his employment with the Company in terms of the letter dated 20th October 2016 as the Group Chief Executive Officer [see page 99, Defendant's Bundle of Documents (Enclosure No. 44)];

F

(d) On the 30th June 2017 the Plaintiff gave a 3-month notice of termination of his services. See page 113, Defendant's Bundle of Documents (Enclosure No. 44). The Board's acceptance of his resignation are shown in the Minutes of the Board Meeting on 30th June 2017 at pages 114 to 121 at paragraph 6.4, page 120, Defendant's Bundle of Documents (Enclosure No. 44);

G

(e) However the Plaintiff retracted his resignation letter and agreed to work under a new employment contract. These matters are recorded in the Board of Directors Meeting on 28th September 2017 at pages 123 to 131, Defendant's Bundle of Documents at paragraphs 2.17 and 3 at page 129.

H

(f) Accordingly the Plaintiff was offered the Employment Contract dated 24th October 2017 for a term of 2 years, expiring on 23rd October 2019 which he accepted. See pages 141 to 142, Defendant's Bundle of Documents (Enclosure No. 44).

I

(g) The said Employment Contract upon its expiry on 23rd October 2019 was not extended. See letter dated 23rd August 2019 from the Chairman of the Board of Directors of the Company informing the Plaintiff of the non-renewal of his Contract at page 143, Defendant's Bundle of Documents (Enclosure No. 44)

[36] She also testifies in her examination-in-chief (WSDW1) at question and answer no. 13 as follows:

Q13: Please refer page 122, Defendant's Bundle of Documents (Enclosure No. 44), which is an e-mail purportedly from the Plaintiff dated 26th September 2017 to the Board of Directors of the Company prior to his engagement under the Employment Contract dated 24th October 2017. Are you aware of this e-mail? A

A: I do not know who is the addressee of this e-mail but I found this e-mail in the Plaintiff's personal file. The addressee was not a director of the Defendant at the material time nor at any time at all. B

[37] DW1, Noor Khatijah binti Osman, who wrote the said email of 23 August 2019, testified as follows in answer to question 6 of her witness statement (WSDW1): C

Q6: Paragraph 2 of the Employment Contract states that the Company shall write to the Plaintiff 2 months prior to the end of the term for the purpose and intent of further extension of employment. Do you know if the Company wrote to him for the said purpose? D

A: (a) Yes, I did. *Vide* my e-mail of 23rd August 2019 to the Plaintiff I informed him that his Employment Contract will expire on 24th October 2017 and that it is extendable for another 2 years on mutual agreement. I stated wrongly the expiry date in this e-mail. The expiry date should be 24th October 2019 instead of 24th October 2017. On the same day, 23rd October 2019 I therefore sent another e-mail to the Plaintiff to correct the mistake and apologized to him. E

(b) In my first e-mail dated 23rd August 2019 I advised the Plaintiff that he is "required to write to the Company of his intention of further extension" of his employment.

(c) The Chairman of the Board of Directors on the same day *ie*, 23rd August 2019 wrote to the Plaintiff to inform him that his Employment Contract will expire on 23rd October 2019 and that the Company has decided not to further renew his Employment Contract. Please see page 143, Defendant's Bundle of Documents (Enclosure No. 44). F

[38] Further, DW1, when cross-examined by the plaintiff's counsel, agreed that she was not personally involved in the negotiation and preparation of the plaintiff's employment contract with the defendant (Q&A 10 of cross-examination). DW1 also agree that she has no knowledge as to why cl. 2 of the employment contract was drafted in that manner (Q&A 13 of cross-examination). In Q&A 15 of cross-examination, DW1 further clarified that in the preparation of the employment contract, she prepared the said contract and she did refer to the plaintiff with regards to cl. 2 of the employment contract dated 24 October 2017, which is the same as Mr Paul Chin's employment contract. G

H

I

A *Testimony Of DW2 (Mahmud bin Amat Shah)*

[39] Mahmud bin Amat Shah (DW2) as the defendant's witness also testified. His witness statement was tendered and marked as "WSDW2". Referring to his witness statement, DW2 testifies as follows:

B Q2: Do you know the Plaintiff, Mr Terry Chan Kong Ngee?

A: Yes, I do know him well. He was an employee of the Company and was engaged as its Chief Executive Officer under various contracts. I have personal knowledge of the last contract, *ie*, the Employment Contract dated 24th October 2017 which was for a period of 2 years. Please see pages 141 to 142, Defendant's Bundle of Documents (Enclosure No. 44).

C

Q3: Before the Employment Contract dated 24th October 2017 was executed by the parties, was it agreed between the parties that the total period of his employment shall be for 4 years with the last 2 years at the Plaintiff's option?

D

A: No, not that I know of.

[40] He further testifies in answer to Q7 in his WSDW2 that:

Q7: I refer you to page 122, Defendant's Bundle of Documents (Enclosure No. 44). Are you aware of this e-mail purportedly dated 26th September 2017 from the Plaintiff to the Board of Directors of the Defendant?

E

A: I am not aware of this letter as I was not in receipt of it and neither do I not know who is "fildzanabulpata", the intended addressee of the said e-mail. It was first shown to me by the Defendant's lawyers when we were preparing for the trial of this case. The Defendant's witness, Noor Khatijah Binti Osman also informed me that the said e-mail was in the Plaintiff's personal file.

F

[41] DW2, in his witness statement, states that he wrote a letter dated 23 August 2019 (p. 68, BOD Part B encl. 57) stating that the plaintiff's employment contract will not be extended upon its expiry on 23 October 2019 after consulting and with the consent of the Board of Directors of the company. The said letter was ratified at the Board meeting held on 6 September 2019 (encl. 57 – Bundle B, at pp. 296 to 312, minutes of Board meeting para. 13, p. 311).

G

H [42] DW2 clarifies further in WSDW2 regarding the decision of not extending the plaintiff's employment contract as follows:

Q6: The Plaintiff is alleging that Datuk Harun Bin Ismail who was a director of the Company at the material time had a personal grudge against him and that was the reason for the non-extension of his Employment Contract. Was that true?

I

A: The decision of the Board not to extend the Plaintiff's Employment Contract was a collective decision and Datuk Harun was only one of the 6 members of the Board who attended the meeting on 6th

September 2019. Please see the attendance list at page 147, Defendant's Bundle of Documents (Enclosure No. 44). In not renewing the Plaintiff's Employment Contract, the Board took into account the Plaintiff's advanced age. He was more than 71 years when his Contract expired and the Company preferred a younger person for the position of Chief Executive Officer.

A

[43] In cross-examination of DW2, he admits that at the time when he issued the letter not to extend the plaintiff's employment contract, the Board had not made any resolution to not extend the plaintiff's contract. (Q&A 18 of cross-examination).

B

[44] The plaintiff's counsel did put several questions pertaining to the reasons for not extending the plaintiff's contract was due to bad faith on the part of the defendant because the defendant was dead set on not renewing the plaintiff's employment contract regardless of whatever reason. However, it was disagreed by DW2.

C

Finding And Analysis Of The Court

D

[45] Issue No. 1: whether this Honourable Court has the jurisdiction to grant the relief sought by the plaintiff in view of the decision of the Court of Appeal in the case of *7-Eleven Malaysia Sdn Bhd v. Ashvine Hari Krishnan* [2023] 4 CLJ 895.

E

[46] The above issue was first brought up by the defendant in their application under O. 18 r. 19 of the Rules of Court 2012 before His Lordship Wong Siong Tung in the case of *Terry Chan Kong Ngee v. Sabah Air Aviation Sdn Bhd* [2021] CLJU 1123; [2021] 1 LNS 1123; [2021] MLJU 1347. This case was argued up to the Court of Appeal. Based on the decision of both the High Court and the Court of Appeal, it was clearly held that the plaintiff's cause of action here is for breach of contract and not for wrongful dismissal.

F

[47] However, the defendant's counsel had brought up to the attention of this court the decision of the Court of Appeal in the latest case of *7-Eleven Malaysia Sdn Bhd v. Ashvine Hari Krishnan* [2023] 4 CLJ 895. According to him, the said case was decided after the High Court's and the Court of Appeal's decision in *Terry Chan Kong Ngee v. Sabah Air Aviation Sdn Bhd* [2021] CLJU 1123; [2021] 1 LNS 1123; [2021] MLJU 1347 and is binding on this court.

G

[48] Having read the facts and issues deliberated in that case and submissions by both counsels, I am more inclined to agree with the plaintiff's counsel that the *7-Eleven's* case should and could be distinguished with the facts and circumstances surrounding the plaintiff's case before this court. In the *7-Eleven's* case, the plaintiff's claim was for constructive dismissal.

H

[49] I am of the view that the decision in the *7-Eleven's* case has no application to this present case before this court and can safely be distinguished. In the *7-Eleven's* case, the decision of the COA was that if the

I

A pleaded claim is for constructive dismissal or for wrongful dismissal, the employee must commence his case in the Industrial Court. As stated in para. [1] of the *7-Eleven's* case wherein Nantha Balan JCA stated:

[1] The question that arises in this appeal is one which is of relevance and importance to employment law and practice in Malaysia and it is this – whether it is an abuse of process of the court for an employee who claims that he/she has been dismissed without just cause or excuse, to file a common law action to claim: (a) damages breach of the employment contract; (b) damages for constructive dismissal; (c) damages for the tort of intentionally causing emotional distress; (d) damages for the tort of harassment and bullying; (e) damages for negligence in appointing, retaining and monitoring the recruitment of employees; and (g) general and exemplary damages, instead of pursuing the statutory dispute resolution mechanism/process to obtain the remedies as provided for under the Industrial Relations Act 1967 ('the Act').

D [50] I also agree with the submission by the plaintiff's counsel that the Court of Appeal in the *7-Eleven's* case had not held that every claim relating to "employment" whether for breach of contract or for wrongful dismissal or for constructive dismissal must be commenced in the Industrial Court.

E [51] As has been decided by the High Court in *Terry Chan Kong Ngee v. Sabah Air Aviation Sdn Bhd* [2021] CLJU 1123; [2021] 1 LNS 1123; [2021] MLJU 1347, that the plaintiff's cause of action here against the defendant is premised on a breach of contract claim *ie*, whether the defendant was in breach of cl. 2 of the employment contract 2017, and this decision was upheld by the Court of Appeal on 22 November 2022. I hold the view that the decision in *7-Eleven's* case is distinguished and is not applicable to the facts and circumstances in this case.

F [52] Issue no. 2: whether the defendant had breached cl. 2 of the employment contract when it did not extend the plaintiff's employment contract for another two years from 24 October 2019 or had failed to offer the plaintiff an extension of two years employment from 24 October 2019?

G [53] In this case, the plaintiff was re-engaged by the defendant as the group chief executive officer (GCEO) and an employment contract were signed between the plaintiff and the defendant as evident in the document of renewal of fix term employment contract dated 24 October 2017 (encl. 57 – Bundle B, pp. 60 to 61).

H [54] One of the salient points of agreement is as stated in cl. 2 as follows:

2. Duration contract terms

I The duration of this Employment Contract shall be two (2) year commencing 24th October 2017, **extendable for another two (2) years on mutual agreement**. The Company shall write to you two months prior to the end of the two years contract **for the purpose and intent of further extension of employment**. (emphasis added)

[55] It was not disputed that the plaintiff's duration of employment shall be for two years and extendable for another two-years on mutual agreement.

A

[56] It was also agreed that the defendant shall write to the plaintiff two months prior to the end of the first two-year contract for the purpose and intent of further extension of the employment.

B

[57] Based on the evidence adduced during the trial, DW1 accordingly, *vide* her email dated 23 August 2019 and copied to DW2, reminded the plaintiff of the expiry of his employment contract on 23 October 2019 and invited him to write to the company for the purpose and intent of further extension of employment when she in her email wrote "You are hereby required to write to the company on the intent of further extension of your employment". DW1 agrees that her email is not intended to offer the plaintiff the extension of the employment contract as she has no authority to do so.

C

[58] I found that instead of waiting for the answer from the plaintiff, DW2 had, on the same day, 23 August 2019, wrote to the plaintiff expressing the Board's decision not to extend the plaintiff's employment contract upon its expiry. No apparent reason was given by DW2 in his letter for such decision.

D

[59] The plaintiff pleads that upon the completion of the first term of his two-year contract, the defendant is under the obligation to write to the plaintiff two months prior to the end of the two-year contract for the purpose and intent of further extension of his employment.

E

[60] It is the plaintiff's contention that the defendant had breached its obligation under cl. 2 of the employment contract by not writing to the plaintiff for the purpose and intent of further extension of employment for another two more years upon the expiry of the first two years contract on 23 October 2019.

F

[61] For the purpose of construing this contentious cl. 2 between the plaintiff and the defendant, this court refers to the following documents relevant to the issue at hand, among others:

G

- (i) the employment contract (encl. 57 – Bundle B, pp. 60 to 61). Clause 2 of the said employment contract states as follows:

2. Duration contract terms

The duration of this Employment Contract shall be two (2) year commencing 24th October 2017, **extendable for another two (2) years on mutual agreement**. The Company shall write to you two months prior to the end of the two years contract **for the purpose and intent of further extension of employment**.

H

(emphasised added)

I

- (ii) enclosure 57 – Bundle B, p. 67 (email from DW1 to the plaintiff dated 23 August 2019).

- A (iii) enclosure 57 – Bundle B, p. 68 (letter from DW2 dated 23 August 2019 to the plaintiff regarding expiry of employment contract).
- (iv) enclosure 57 – Bundle B, p. 69 (letter from the plaintiff to the defendant dated 5 September 2019 address to the chairman of the defendant on termination of his employment contract).
- B (v) enclosure 57 – Bundle B, p. 311 (minutes of 253rd Board of Directors meeting dated 6 September 2019 – para. 13 on resolution by the Board that the plaintiff’s contract is not extended).
- C [62] The employment contract dated 24 October 2017 (encl. 57 pp. 60 & 61) was duly executed by the plaintiff and the defendant, where the plaintiff was offered new terms of employment.
- [63] It was also established and agreed that the term of the contract was for two years commencing 24 October 2017 and is extendable for another two years on mutual agreement.
- D [64] The contract requires the defendant to write to the plaintiff two months prior to the end of the two-year contract for the purpose and intent of further extension of employment.
- E [65] I am of the view that for issue no. 2, the dispute between the plaintiff and the defendant can be further summarised as follows:
- (i) whether the further extension of the employment contract is automatic upon its expiry.
- (ii) whether the words “mutual agreement” in cl. 2 carries the meaning that the extension shall be agreed first by both parties before the next term of two years can operate.
- F (iii) whether the obligation to write to the plaintiff two months before the expiry of the employment contract is for the purpose and intent to offer a further extension or for the purpose and intent to notify the plaintiff to write to the defendant on the plaintiff’s intent of further extension of his employment.
- G (iv) whether the extension of employment should be at the option of the plaintiff or the defendant or to be mutually agreed by both parties.
- H [66] The employment contract must be read as a whole. This includes the reading of cl. 2 of that contract, which shall not be read in isolation of other sentences in that paragraph in order to understand the real intention of that cl. 2.
- I [67] It is trite that when the term of a contract or of a grant or of any other disposition of property has been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in

proof of the terms of the contract, grant or other disposition of property or of the matter except the document itself, or secondary evidence is admissible under the provisions hereinbefore contained (see s. 91 of the Evidence Act).

A

[68] With regards to the issue in para. [65](i) above, it is not the intention of the parties that the said employment contract will be automatically be extended as no such intention is expressly stated in that employment contract.

B

[69] For issue (ii), cl. 2 of the employment contract states, “The duration of this employment contract shall be two years commencing 24 October 2017, extendable for another two years on mutual agreement”. The words “mutual agreement” in its ordinary meaning requires the agreement of both parties to the extension of the said employment contract. Failure by any of the parties to agree to the extension will render the said extension of the contract impossible to implement.

C

[70] Therefore, it is clear that the words “extendable for another two years on mutual agreement” shall be construed in its ordinary and plain meaning that the employment contract between the plaintiff and the defendant could be extended for another two more years if both parties agree to such extension. However, what is the process or procedure for such extension that was agreed by the parties?

D

[71] In respect of issue no. (iii), cl. 2 states “The company shall write to you two months prior to the end of the two years contract for the purpose and intent of further extension of employment”. It was submitted that the defendant has failed to comply with this provision in which the defendant did not write to the plaintiff within the said period and also failed to offer the extension of employment to the plaintiff.

E

F

[72] The facts established before this court in respect of the above issue (iii) are as follows:

- (i) DW1 wrote email dated 23 August 2019 @ 11.34am and 12pm (p. 67 Bundle B) as follows:

G

Dear Mr Terry,

With reference to your employment contract dated 24th October 2017, with Ref. No.: SAA-HRM-LET-CR-033-1017. This is to inform that your contract of employment due by 24th October 2017 and extendable for another two (2) years on **mutual agreement**.

H

You are hereby required to write to the Company on the intent of further extension of your employment.

Thank you

Kind Regards,

I

Noor Khatijah Osman

(emphasis added)

A (ii) later, at 12pm, DW1 wrote another email of correction as follows:

Dear Mr Terry,

Apologize for the typo error. The date should read 24th October 2019 instead of 24th October 2017.

B Apologize for the inconvenience caused.

Thank you

Kind Regards

Noor Khatijah Osman

C (iii) subsequent to the above email, the defendant, through DW2, had issued out a letter dated 23 August 2019 addressed to the plaintiff entitled “Expiry of Employment Contract” (see p. 68 Bundle B – encl. 57). Paragraph 2 of the letters states as follows:

D Pursuant to Clause 2 of the said Employment Contract, your term as Group Chief Executive Officer at Sabah Air Aviation Sdn Bhd is due to expiry on the 23rd October 2019. This letter serves as confirmation that Sabah Air Aviation Sdn Bhd has decided not to further renew the said Employment Contract.

E (iv) on 5 September 2019, the plaintiff wrote to DW2 as the chairman of the defendant in reply to the DW1 and DW2’s email and letter dated 23 August 2019 (see p. 69 Bundle B – encl. 57). In the said letter, the plaintiff put on record his dissatisfaction with the decision made by the defendant and alleging that the decision not to extend his employment was done in bad faith and tantamount to unlawful termination and/or termination without just cause and excuse.

F [73] The plaintiff argues that upon the expiry of the first two-year period, the defendant shall write to the plaintiff whether the plaintiff intends to extend his employment or otherwise. The plaintiff argues that the option to extend the employment shall be on the plaintiff.

G [74] On this point, the defendant’s counsel submitted as follows and I quote:

H (i) It goes against common sense in employment contracts under which the employees are engaged on a fixed-term that the employee should have the exclusive option of their renewal.

I (ii) If the Plaintiff indeed had the exclusive option to extend his employment contract, a reasonable person in the position of the Plaintiff would not have agreed in Clause 1 that the contract is “extendable ... by mutual agreement”. Extendable in its natural and ordinary meaning means something that can be lengthened or stretched while mutual agreement, as seen earlier, means a situation when two or more parties agree to a common thing. A reasonable person in the position of the Plaintiff who wants an exclusive option to extend the employment contract would have certainly omitted

the words mutual agreement as well extendable in Clause 1 and would have simply stated that upon the expiry of the contract, the Plaintiff would have the option to extend the contract for 2 years or words to similar effect.

A

Interpretation Of Clause 2 Of Employment Contract

[75] On the issues in para. [65](iii) and (iv) above, it is inevitable to now consider whether based on cl. 2, the requirement of writing to the plaintiff is for the sole purpose of offering the plaintiff the extension of the employment contract as alleged by the plaintiff?

B

[76] The relevant part of cl. 2 states:

C

The Company shall write to you two months prior to the end of the two years contract for the purpose and intent of further extension of employment. (emphasis added)

Is this phrase intended to impose an obligation on the defendant to offer the extension of employment to the plaintiff?

D

[77] As submitted by the defendant's counsel, the interpretation of contracts is exclusively a judicial function. Drawing from the English landmark case of *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, the principles of interpretation of contract are succinctly laid down by the Federal Court in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177 as follows:

E

(i) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

F

(ii) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

G

(iii) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

H

(iv) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background may not merely enable the reasonable

I

- A man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v. Eagle Star Life Assurance Co Ltd* [1995] 1 WLR 1 508.
- B (v) *The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.* Lord Diplock made this
- C point more vigorously when he said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191, 201: (emphasis given) If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to conclusion that flouts business common sense, it must be made to yield to business common sense.
- (emphasis added)
- D [78] According to the plaintiff, initially, he was offered a four-year contract by the defendant. However, in view of his advanced age, he has proposed for the term to be fixed on the basis of two years and be given an option of two years. This is to enable him to decide whether he is able to continue with his service or otherwise in view of his age at that material time.
- E [79] This testimony was not able to be challenged or tested in cross-examination in view of the plaintiff’s ill condition at that material time, though this is a crucial piece of evidence, and this evidence is being challenged in the defendant’s case.
- F [80] There was no other witness called by the plaintiff to substantiate his contention. The plaintiff’s contention that he had emailed his terms of re-engagement as evidenced in his email dated 26 September 2017, addressed to one, fildzanabdulpata@gmail.com (encl. no. 58 p. 1, agreed bundle of documents (Part C), was not agreed to be part of the evidence in this case
- G on the reason that the said document and recipient were not known to the defendant. Thus, the authenticity and contents of this document are disputed and failed to be proved by the plaintiff and shall not be considered as evidence by this court.
- H [81] As mentioned above, this cl. 2 shall be read in its entity and not in isolation. The intention of the parties at the time when the contract was concluded could be reflected from the facts and surrounding circumstances of this case. Both parties had agreed that the employment contract was executed by them on 24 October 2017 with all the terms and conditions expressly stated as in the said contract.
- I [82] No witness in this trial that can positively testify regarding the so-called real intention of the parties at the time the employment contract was concluded. PW1’s evidence, though admitted as his oral evidence in

court was not put to test through cross-examination. The general principle is, failure to cross-examine the witness on any evidence of that witness will render that evidence accepted and admitted by the court.

A

[83] In *Phipson on Evidence* (11th edn) para. 1544, the learned authors suggest by way of exception to the general principle that failure to cross examine will amount to an acceptance of the witness testimony, viz, where:

B

... the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy or when counsel indicates that he is merely abstaining for convenience, eg, to save time. And where several witnesses are called to the same point it is not always necessary to cross examine them all.

C

(see *PP v. Dato' Seri Anwar Ibrahim & Anor* [2001] 3 CLJ 313; [2001] 3 MLJ 193).

[84] However, this general principle, to my mind, shall not apply in this case as cross-examination was not carried out on humanitarian grounds as the plaintiff was seriously ill at that material time and the parties have agreed for the proper weightage to be attached to the plaintiff's testimony at the end of the trial.

D

What Weightage To Be Attached To The Plaintiff's Written Statement

[85] I have instructed the parties to put up their submission on this issue as to what weightage to be attached to the plaintiff's testimony. What principles or legal position to be followed in such circumstances? Should the plaintiff's evidence in WSPW1 be accepted *in toto* or otherwise?

E

[86] The plaintiff's counsel cited the Federal Court case of *Dr Shanmuganathan v. Periasamy Sithambaram Pillai* [1997] 2 CLJ 153; [1997] 3 MLJ 61 and *Kho Tian Boo v. Tengku Ibrahim Petra Tengku Indra Petra* [2011] CLJU 1603; [2011] 1 LNS 1603; [2012] 9 MLJ 249, respectively.

F

[87] The principles laid down in the Federal Court case of *Dr Shanmuganathan v. Periasamy Sithambaram Pillai* (*supra*), where Anuar CJ (Malaya) had this to say:

G

In *Mt Haril Kuer & Anor v. Rajah Ali & Ors* AIR 1936 Pat 34, it was held that the weight to be attached to the evidence depends on the circumstances and the court should look whether there are indications that by a completed cross-examination, the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached. Rowland J in that case held:

H

This decision which was followed in 1929 Lah 840 (7) seems to me, if I may say so with respect, to state the law correctly. I do not understand the observations of the learned judge to mean that there is any hard and fast rule that the probative value of such evidence is small, and in my view, there is no such rule. *The weight to be attached to the evidence depends on the circumstances and the court*

I

A *should look at the evidence carefully to see whether there are indications that by a completed cross-examination, the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached.*
(emphasis added)

B [88] Though the facts and circumstances leading to the not cross-examining of the witness are different, the principles and findings of the court in the said cases are applicable in this case.

C [89] Based on the above principles, this court should look at the evidence carefully to see whether there are indications that by a completed cross-examination, the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached.

D [90] Having considered the evidences of the plaintiff as a whole, the issue in dispute mainly focus on cl. 2 of the employment contract in respect of the non-extension of the plaintiff's employment. In my view, though the cross-examination is not done, it does not seriously affect or shake the plaintiff's testimony on that issue. It will still depend on the interpretation or construction of the phrase in cl. 2 by the court.

E [91] Therefore, I agree that taking the whole of the plaintiff's testimony as in WSPW1 and testing the same with the other documentary evidence tendered and testimonies of the witnesses during the trial of this case, there is no indication that by a completed cross-examination, the plaintiff's testimony will be likely to be seriously shaken or his good faith to be successfully impeached.

F [92] The defendant's witnesses, DW1 and DW2, admit that they were not involved in any negotiation or discussion between the plaintiff and the defendant, therefore, they do not have personal knowledge of what transpired before the employment contract was concluded. In this trial, the defendant did not call the defendant's director by the name of Mr Mau Kam Wai, the signatory of the employment contract on behalf of the defendant as their witness. However, such person if called is governed by the limitation under s. 92 of the Evidence Act 1950 where it states:

H When the term on any such contract have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms: (subject to the proviso in (a) to (f)).

I [93] Relying on the principles laid down in the case of *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177 as follows:

I (i) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(v) The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191, 201: If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to conclusion that flouts business common sense, it must be made to yield to business common sense.

[94] In interpreting cl. 2, the plaintiff’s counsel refer to the case of the Federal Court in the recent case of *Catajaya Sdn Bhd v. Shoppoint Sdn Bhd & Ors* [2021] 3 CLJ 159; [2021] 2 MLRA 46 that had relied on the Federal Court case of *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177; [2016] 1 MLRA 1 wherein Zainun Ali FCJ had this to say when interpreting a contract by the court:

[52] Zainun Ali FCJ went on further to explain:

[41] Thus in addition to the above in interpreting the contract, the court must approach it holistically. No term is to be taken or interpreted in isolation. This canon of construction is so long established, it is almost banal. See for instance *Chamber Colliery Ltd v. Twyerould* [1893] [1915] 1 Ch 268 (Note): ... the application of the well-known (*sic*) rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.

[95] The Federal Court in the *Catajaya Sdn Bhd*’s case went further wherein in para. [57] it was held that:

[57] The terms and conditions of an agreement that have been agreed to by the parties of the agreement cannot be simply brushed aside and ignored. This Court through the judgment of Azahar Mohammad FCJ in the case *Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong* [2016] 3 MLRA 367 explained the principle of construing a contract as follows:

... it is an established principle of construing a contract that, among others, a contract must be construed as a whole, in order to ascertain the true meaning of its several clauses, and also, so far as practicable, to give effect to every part of it. Each clause in an ordinary commercial contract should be so interpreted as to bring them into harmony with the other clauses of the contract (see *National Coal Board v. WM Neill & Son (St Helens) Ltd* [1984] 1 All ER 555 which was cited in *Royal Selangor Golf Club v. Anglo-Oriental (M) Sdn Bhd* [1990] 2 MLRH 383 and *Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd* [2003] 1 MLRA 577). In

A *Australian Broadcasting Commission v. Australasian Performing Right Association Limited* [1973] 129 CLR 99, it was held that *the whole of the contract has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another.*
(emphasis added)

B *Decision*

[96] I have considered the testimony of the plaintiff through his witness statement tendered as WSPW1 and the testimonies from the defendant's witnesses (DW1 and DW2) and the documentary evidence adduced during the trial. I have also read and considered the arguments by both learned counsels in their submissions and the cases cited in this trial.

[97] As for the issue on the jurisdiction of this court to hear the plaintiff's claim, I am of the view that the case of *7-Eleven* is distinguishable in that the decision in the *7-Eleven's* case pertains to the claim for constructive dismissal, whereas the plaintiff's claim before this court is based on a breach of contract by the defendant for not offering the extension of employment as per cl. 2 of the employment contract.

[98] As have been decided by the High Court in *Terry Chan Kong Ngee v. Sabah Air Aviation Sdn Bhd (supra)* that the plaintiff's cause of action here against the defendant is premise on a breach of contract and this decision was upheld by the Court of Appeal on 22 November 2022. Therefore, I hold the view that the decision in *7-Eleven's* case is distinguished and is not applicable in this case.

[99] On the issue of breach of contract by the defendant, based on the testimonies of PW1, DW1 and DW2 and the documentary evidence adduced before this court, I am satisfied on the balance of probability that the plaintiff have proved that the defendant failed to fulfil their express obligation under cl. 2 of the employment contract.

[100] Upon interpretation and construction of the wording in cl. 2, the plain and ordinary meaning of it clearly requires the defendant to write to the plaintiff two months prior to the end of the two-year period of the plaintiff's employment on 23 October 2019 for the purpose and intent of extension of the plaintiff's employment. This is the procedural step agreed by the parties.

[101] The email sent by DW1 on 23 August 2019 was not a letter of offer to further extend the plaintiff's employment as agreed by DW1. It was a mere notification to the plaintiff to invite the plaintiff to write to the defendant whether the plaintiff wishes to extend his employment contract or otherwise. Thus, DW1 email clearly does not fulfil the requirement of cl. 2 of the employment contract.

[102] The letter issued by DW2 to the plaintiff dated 23 August 2019 clearly proves a breach of the defendant's obligation under cl. 2 of the employment contract. Though the letter was issued out within two months before the

expiry of the plaintiff's contract, the defendant, through DW2, failed to adhere to cl. 2 of the employment contract where mutual agreement requirement was not fulfilled.

A

[103] Though the extension of the employment contract requires a mutual agreement between the plaintiff and the defendant, there is no evidence adduced by the defendant to show that such effort have been taken by them to enquire from the plaintiff as to his wish as required under cl. 2 of the contract. Mutual agreement means two-way communication and not a unilateral decision.

B

[104] The defendant in this case clearly failed to give any opportunity or choice to the plaintiff to express his intention regarding the extension of his employment. In construing cl. 2 as a whole, the clear wording of that clause requires both parties to mutually agree on the extension of the employment. By not giving the plaintiff an opportunity to express his wish with regards to the extension of his employment is a clear contravention of the intention of cl. 2 of the contract.

C

D

[105] Clause 2 also imposed a clear obligation on the defendant to write to the plaintiff for the purpose and intent of further extension of the employment. DW2's letter is a clear breach of this obligation when the defendant decides not to extend the plaintiff's employment on a unilateral basis.

E

Conclusion

[106] In view of the findings and analysis above, I found that:

- (i) this court does have jurisdiction to hear the plaintiff's claim against the defendant and based on the nature of the claim in this case which is based of breach of contract, the decision of the Court of Appeal in *7-Eleven's* case is distinguished.
- (ii) the defendant has breached cl. 2 of the employment contract dated 24 September 2017 entered between the plaintiff and the defendant by not writing to the plaintiff for the purpose and intent of further extension of the plaintiff's employment. The defendant's action of not extending the employment contract was done unilaterally and in breach of the express requirement of mutual agreement under cl. 2 of the employment contract.

F

G

H

[107] In view of the above reasons, I allowed the plaintiff's claim against the defendant and judgment is entered against the defendant as prayed for in the plaintiff's statement of claim with costs to the plaintiff.

[108] I also ordered for cost of RM30,000 to be paid to the plaintiff subject to allocatur.

I